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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOINT COUNCIL OF TEAMSTERS NO. 42, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether the Board correctly found that the owner-operators of dump trucks hauling materials to and from construction sites were independent contractors, rather than employees within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3).

2. Whether the Board correctly found that the disputed clauses of the collective bargaining agreement were not protected by the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. 158(e).

3. Whether the Board reasonably exercised its remedial discretion by enjoining the unions and the employer associations from continuing to give effect to an agreement that violated Section 8(e) of the Act, but declining to require the unions to reimburse independent contractors for union fees and dues paid pursuant to the agreement, where there was no showing that the unions coerced any independent contractors to make such payments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 671 F. 2d 305. The decision and order of the National Labor Relations Board (Pet. App. 12-14) are reported at 248 N.L.R.B. 808.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1982, and a petition for rehearing was denied on March 2, 1982 (Pet. App. 1). On May 18, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 1, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The 1977-1980 Master Labor Agreement (MLA) between petitioner unions and the Contractors Associations[1] included provisions that, with certain exceptions not relevant here, required owner-operators of dump trucks transporting materials to or from the job site to become "employees" of the signatory contractors. As employees, they were subject to all the terms and conditions of the MLA, including the union membership provisions (Pet. App. 16-21).

Much of the hauling of material to and from construction sites in the relevant area is done by dump truck owner-operators whose services are procured by the contractors through brokers, who refer owner-operators to jobs for a five percent commission. The owner-operators generally have subhaul agreements with several brokers, and typically work through several brokers during a week's time. The owner-operators are free to refuse brokers' referrals, to leave jobs prior to completion, or to substitute other owner-operators in their stead. (Pet. App. 22-23.)

The owner-operators ordinarily are paid in gross by the brokers with no deductions for taxes. In addition, they generally are paid only for hours when their equipment is in use, in contrast to drivers actually employed by the contractors themselves, who are paid on an hourly basis, even when their company-owned vehicles are not in operation. Most of the owner-operators' work is regulated by the California Public Utilities Commission, which sets minimum tariffs, although the contractors, brokers, and owner-operators sometimes negotiate higher rates for particular jobs. Owner-operators are responsible for all costs of owning, operating,

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[1] Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; Engineering Contractors Association, Inc.; and Southern California Contractors Association.

maintaining, and repairing the equipment they use, including taxes and licenses (Pet. App. 23-24). The owner-operators' contact with employees of the contractors is minimal, involving, at most, the receipt of general instructions from superintendents or directional signals from flagmen for placement of their vehicles for loading and unloading. The bulk of their time is spent driving between loading and unloading sites (Pet. App. 25-26).

2. In this case, charges were filed with the Board by several associations of dump truck owner-operators alleging that the provision in the MLA requiring them to be regarded as "employees" of the signatory contractors and subject to the union membership provision of the MLA violated Section 8(e) of the Act, 29 U.S.C. 158(e). The Board noted that the same parties were involved in earlier litigation concerning the status of the dump truck owner-operators, which ultimately resulted in the Board's acceptance of the view of the United States Court of Appeals for the Ninth Circuit that the owner-operators are independent contractors and not "employees" under Section 2(3) of the Act, 29 U.S.C. 152(3).[2] The Board further noted that no significant change of circumstances had been alleged to require a different result here. Accordingly, the Board ruled that "under established principles of *res judicata* and collateral estoppel, the final and conclusive finding in the prior case that the dump truck owner-operators are independent contractors is controlling in this proceeding" (Pet. App. 31).[3]

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[2] *Associated General Contractors of California, Inc.*, 239 N.L.R.B. 686 (1978), on remand from 564 F. 2d 271 (9th Cir. 1978).

[3] The Board subsequently adopted the Ninth Circuit's view on the merits in *Building Material & Dump Truck Drivers, Local 36*, 249 N.L.R.B. 386 (1980), enforced, 669 F. 2d 759 (D.C. Cir. 1981), cert. granted on other grounds *sub nom. Larry Shepard* v. *NLRB*, No. 81-1627 (May 17, 1982).

Having ruled that the owner-operators are not employees who could be made subject to the collective bargaining agreement, the Board held that the owner-operator provisions violated Section 8(e) of the Act because they required "all employer-members of [the Contractors] Associations to cease doing business with [independent contractor] dump truck owner-operators who do not become union members and employee-drivers subject to all terms of the MLA" (Pet. App. 31, 38). In so holding, the Board determined that the disputed provisions were not saved from illegality by the construction industry proviso to Section 8(e). The Board explained that the MLA provisions applied to transportation of materials to sites not controlled by signatory members (Pet. App. 36-37), but that, even if the provisions had been limited to transportation of materials controlled by the same contractor, the work involved would not be deemed, in the words of the proviso, "work to be done at the site of the construction," because the owner-operators were essentially involved in making pickups and deliveries and spent the bulk of their time in "off-site travel" (Pet. App. 37-38).[4]

The Board issued a cease and desist order, but denied the request of the charging party, California Dump Truck Owners Association, that the Board require the petitioner unions "to reimburse any owner-operators for payments of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of the unlawful terms of [the] MLA (Pet. App. 39 n.34). The Board explained (*ibid.*; emphasis in original):

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[4]The Board also found that Local 420 violated Section 8(b)(4)(ii)(A), 29 U.S.C. 158(b)(4)(ii)(A), by threatening an owner-operator with the loss of a job unless he became a member of Local 420, and by "coercively insist[ing] that [a signatory contractor] cease doing business with [owner-operators] who were not and would not become members of Local 420" (Pet. App. 38-39). There was no evidence that any owner-operator joined local 420 as a result of this unlawful conduct.

> [N]o evidence has been introduced with respect to alleged losses directly attributable to actual coercion by [petitioners], nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reason, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al.* v. *NLRB*, 365 U.S. 651 (1961).

3. The court of appeals enforced the Board's order finding a violation of the Act (Pet. App. 2). The court agreed with the Board that the owner-operators were "self-employed independent contractors" (Pet. App. 3 n.3), and further agreed that the disputed provisions of the MLA violated Section 8(e) and were not protected by the construction industry proviso because the owner-operators' delivery work is not within the scope of the proviso (Pet. App. 3-4).

However, the court remanded for further consideration on the issue of a make-whole remedy, finding that the Board had "failed to offer a rational ground for refusing to order reimbursement in this case" (Pet. App. 5). The court rejected as inadequate the reasons profferred by the Board for the refusal, and noted its disagreement with the United States Court of Appeals for the District of Columbia Circuit, which "affirmed the Board's denial of a make-whole remedy for dump truck owner-operators in *Building Material and Dump Truck Drivers* v. *NLRB*, 669 F. 2d 759 at

765-767 (D.C. Cir. 1981)"[5] (Pet. App. 10). Thus, the court remanded to the Board "to fashion a make-whole remedy or to show cause why a make-whole remedy would not effectuate the purposes of the Act" (Pet. App. 10; footnotes omitted). The court expressed no view, however, "as to whether the Board should order compensation for lost income resulting from enforcement" of the unlawful clauses (Pet. App. 10 n.12).

ARGUMENT

1. Petitioners contend (Pet. 12-14) that this Court should review the Board's determination, upheld by the court of appeals, that the dump truck owner-operators are independent contractors rather than employees. Citing *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F. 2d 1322, 1329 (1971), in which the District of Columbia Circuit sustained the position then held by the Board that the owner-operators were employees, petitioners argue that certiorari should be granted to resolve a conflict in the circuits on this issue.

However, subsequent to the D.C. Circuit's decision in *Joint Council of Teamsters No. 42*, the Board changed its view and concluded that the owner-operators were independent contractors. See *Building Materials & Dump Truck Drivers, Local 36, supra*, 249 N.L.R.B. at 391. The D.C. Circuit then approved the Board's new position and enforced the Board's order in that case. 669 F. 2d at 764-765. Accordingly, there is no conflict between the Ninth and D.C. Circuits on this issue. As a result, the only issue actually presented on this point is whether, on the facts of this case, the Board properly found the owner-operators to be independent contractors. That fact-bound issue does not

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[5]Certiorari granted *sub nom. Larry Shepard* v. *NLRB*, No. 81-1627 (May 17, 1982).

warrant review by this Court. See *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968).[6]

2. Nor does the question whether the transportation work involved here is within the scope of the construction industry proviso to Section 8(e) (Pet. 14-16) warrant review by this Court.[7] As the Board noted (Pet. App. 33), the legislative history of Section 8(e) indicates that transportation work involving supplies to construction sites is not covered by the proviso. H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959). In addition, the Board has consistently held that such work is not exempted from Section 8(e) by the proviso, and the courts have sustained that position. See, *e.g.*, *Drivers, Salesmen, & Helpers, Local 695* v. *NLRB*, 361 F. 2d 547, 552-553 (D.C. Cir. 1966) (ready-mix cement truck drivers); *NLRB* v. *Teamsters, Local 294*, 342 F. 2d 18, 21-22 (3d Cir. 1965) (ready-mix cement truck drivers); *Joint Council of Teamsters No. 42 (Inland Concrete Enterprises, Inc.)*, 225 N.L.R.B. 209, 217

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[6]In any event, the Board's position that these and similarly situated owner-operators are independent contractors, and not employees, is entirely reasonable. The owner-operators operate as independent businessmen, bearing their own expenses; making their own decisions as to when, whether, and how to work; and taking full responsibility for their equipment. As the Ninth Circuit observed in the original case discussing the owner-operators' status, each owner-operator "operates an independent business of his own * * *. [B]eing entrepeneurs, each must invest substantial sums in equipment and bear the risk of any loss attributed to his operation * * *." *Associated General Contractors* v. *NLRB*, 564 F. 2d 271, 281 (1978). Moreover, as the Ninth Circuit there noted, the fact that the owner-operators could freely hire substitute drivers or subcontract referrals "is clearly inconsistent with a finding that a personal employee-employer relationship exists. It is further evidence that the owner-operator's truck is his exclusive domain, and that its operation is beyond the authority of the contractor." *Id.* at 282.

[7]The proviso states that Section 8(e) "shall [not] apply to any agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."

(1976) (delivery of precast concrete pipe); *Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (D. Fortunato, Inc.)*, 197 N.L.R.B. 673, 677-678 (1972) (delivery of tools, material and personnel); *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Clemence D. Stanton, d/b/a Rexford Sand and Gravel Co.)*, 195 N.L.R.B. 378, 381 (1972) (delivery of landfill).

This Court's decision in *Woekle & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), cited by petitioners (Pet. 15), is not to the contrary. All the work in issue there was to be done at the construction site (slip op. 2, 4, 10). Here, the work was done primarily off the jobsite. While it is true, as petitioners assert (Pet. 15), that this Court concluded in *Woelke & Romero, supra*, slip op. 16-17, that the proviso is only partly concerned with jobsite friction, nothing in the Court's opinion called into question the explicit limitation of the proviso to jobsite work or the Board's consistent interpretation of the proviso as excluding transportation work.

3. The final question presented by petitioners (Pet. 16-18)—whether the Board properly declined to order reimbursement of union fees and dues paid by the owner-operators pursuant to the agreement—is the issue presented in *Shepard* v. *NLRB*, cert. granted, No. 81-1627 (May 17, 1982). We therefore suggest that the Board hold the petition in this case for disposition in light of the decision in *Shepard* v. *NLRB*.[8]

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[8]We disagree with petitioners' suggestion (Pet. 17-18) that the Court should grant certiorari in this case now and consolidate this case for argument with *Shepard*. Petitioner's brief has been filed in *Shepard*, and the Board's brief is due to be filed on September 7, 1982. The Court's scheduling of argument in *Shepard* could be delayed if it were necessary to allow time for briefing in this case. Moreover, because

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Larry Shepard* v. *NLRB*, No. 81-1627, and the petition should be disposed of as to Question 3 in light of this Court's decision in that case. The petition should be denied as to Questions 1 and 2.

Respectfully submitted.

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Shepard presents the precise question that petitioners raise here, and because the factual settings of the two cases are so similar, it is our view that the Court's consideration of the issue of the Board's discretion to decline to order reimbursement of union fees and dues would not be significantly illuminated by the Court's review of the decison in this case as well.

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